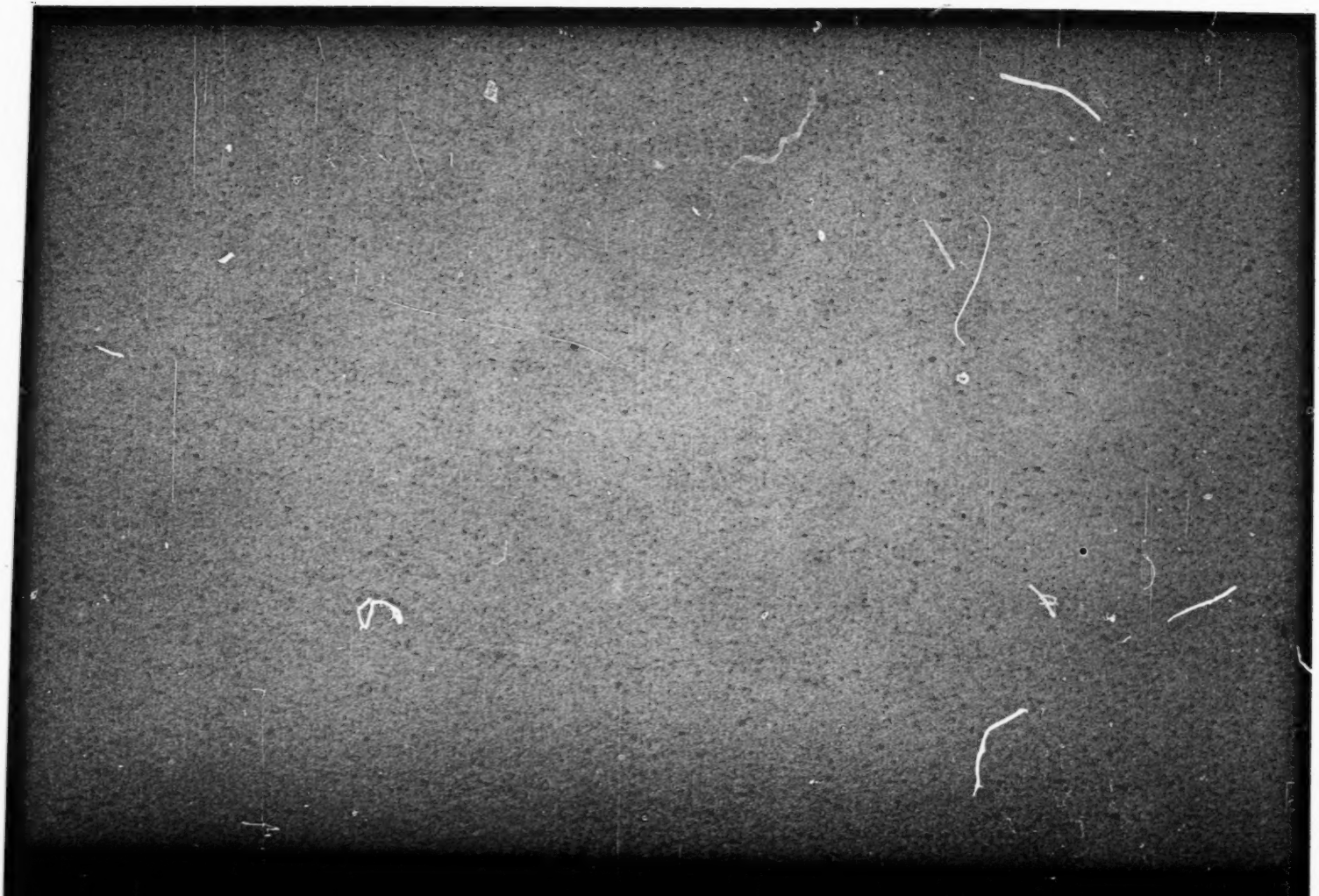

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-578

FLOYD E. BURKHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted of willfully attempting to evade income tax for the year 1969, in violation of 26 U.S.C. 7201. The district court sentenced him to a term of ten days in jail and a fine of $3,500 (Pet. App. 5-6), and the court of appeals affirmed (Pet. App. 7-13). The evidence showed that petitioner's reported taxable income of $8,868.51 for 1969 was understated by $32,261.21, which resulted in $12,222.31 of additional taxes due (R. 4c-4i).[1]

1. Petitioner argues (Pet. 4) that he was deprived of a fair trial because the prosecutor commented that he failed to call his wife as a witness. The underlying facts, as stated by the court of appeals, were as follows (Pet. App. 9-10):

[1] "R." refers to the record appendix filed in the court of appeals.

> Appellant had argued that some farm income had been unreported because he was operating the farm in a joint venture with his parents, who were entitled to the unreported income. Appellant's wife was privy to essential conversations bearing on the credibility of this defense, and in his closing argument the prosecutor asked the jury to disbelieve the joint venture defense, partly on the basis that Appellant had not called his wife to testify. Appellant did not object to this statement.
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> * * * Appellant injected his wife's testimony into the dispute. He challenged the testimony of two Government witnesses by asking whether his wife had made statements to them which would undermine their claims. Yet, he failed to call his wife to the stand to verify what he claimed she had told the witnesses. Thus, Appellant attempted to use his wife's silence as implicit support for her statements, since the jury would assume that her testimony would support Appellant, and as implicit refutation of the Government's witnesses.* * *

Petitioner's reliance (Pet. 4) upon *Graves* v. *United States,* 150 U.S. 118, is misplaced.[2] There, the Court held that the defendant was deprived of a fair trial because the prosecutor commented that the absence of the defendant's wife from the courtroom prevented government witnesses from identifying her as the woman who was said to have been with the defendant. The basis of the decision in *Graves* was the formerly applicable rule that a wife was

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[2]*Griffin* v. *California,* 380 U.S. 609, cited by petitioner (Pet. 4), is not germane, since it involved a prosecutorial comment on the defendant's own failure to testify.

not a competent witness either for or against her husband (see 150 U.S. at 121). The modern rule, however, adopted by this Court in *Funk* v. *United States,* 290 U.S. 371, is that a wife is a competent witness to testify for her husband but is ordinarily not a competent witness against him because of the marital privilege. See *Hawkins* v. *United States,* 358 U.S. 74, 76-79. Since petitioner's wife was a competent witness to testify in his behalf, the propriety of the prosecutor's comment concerning her absence should be viewed as a statement concerning the failure of any competent witness to testify for the defendant in a criminal trial.

As the court of appeals noted (Pet. App. 9-10), an adverse inference is permitted from the failure of a defendant to call a witness who is peculiarly within his power to produce, provided that the testimony of the witness would elucidate the transaction. *United States* v. *Blakemore,* 489 F.2d 193, 195 (C.A. 6); *Wynn* v. *United States,* 397 F.2d 621, 625 (C.A.D.C.), and cases there cited. The inference is permissible even where, as here, the witness in question is the defendant's wife. *Bisno* v. *United States,* 299 F.2d 711, 720-722 (C.A. 9), certiorari denied, 370 U.S. 952; *United States* v. *Seay,* 432 F.2d 395, 404 (C.A. 5), certiorari denied *sub nom. McGee* v. *United States,* 401 U.S. 942.

Even assuming *arguendo* that the prosecutor's comment was an infringement of the marital privilege, cf. *Tallo* v. *United States,* 344 F.2d 467, 469-470 (C.A. 1), the privilege can be and was waived in this case. *United States* v. *Moorman,* 358 F.2d 31, 33 (C.A. 7); *Olender* v. *United States,* 210 F.2d 795, 800 (C.A. 9). Here, as the court of appeals stated (Pet. App. 10), petitioner waived the marital privilege when he "introduced his wife's statements during cross-examination of the Government witnesses." Under the circumstances, the prosecutor's comment can-

not be regarded as having deprived petitioner of a fair trial. Certainly, petitioner having failed to object to the comment at the time, it did not rise to the level of plain error.

2. Petitioner further argues (Pet. 2, 4) that the district court improperly responded to a question asked by the jury during the period of its deliberation. The jury asked: "If vote is 'not guilty', does the defendant have to pay his taxes and penalties?" The judge responded: "The issues in this case to be considered and decided by the jury have been set forth in the Court's instructions. The question you have raised is not an issue in this case" (R. 12a-13b). This was a proper neutral response, designed to eliminate from the jury's consideration a matter not properly before it, for it is settled that the matter of civil liability is not at issue when a jury is determining a defendant's criminal liability for tax evasion, and that a verdict in a criminal case does not preclude the government from collecting back taxes and penalties in a civil case. *Helvering* v. *Mitchell,* 303 U.S. 391. In its opinion, upon which we rely, the court of appeals correctly rejected petitioner's contention as follows (Pet. App. 11-12):

> Thus, the District Judge was faced with the problem of avoiding prejudice to Appellant out of jury concerns which were extraneous to a proper finding of guilt or innocence and of not encouraging the jury to acquit Appellant for similarly irrelevant reasons. Without stating a rigid rule, we believe that the District Judge chose the proper course in this case. Rather than advise the jury about the legal effect of an acquital on Appellant's civil liability, he told the jurors that civil liability for back taxes was not an issue in the criminal case and that the jury should follow his

> instructions in determining Appellant's innocence or guilt. We cannot find error in this response. [Footnote omitted.]
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> By not advising the jury of an acquittal's effect on Appellant's civil obligations, the District Court reemphasized the jury's obligation to uphold their oath—to follow the law in determining innocence or guilt. * * *
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> * * * [I]t is not the judge's place to advise the jury of the possible collateral effects of their decision, information that has nothing to do with the legal standards which they have sworn to apply.

3. Finally, petitioner contends (Pet. 4) that the government was required to corroborate the fact that he had received farm subsidy income as reported on his tax return, but failed to do so. He urges that the government was not entitled to rely upon the admissions on his tax return. But the cases relied upon by petitioner, *United States* v. *Calderon,* 348 U.S. 160, and *Smith* v. *United States,* 348 U.S. 147, do not support his claim. They involved admissions made after the commission of the crime to officials charged with investigating the possibility of wrongdoing, where the admissions embraced elements vital to the government's case. Here, however, the admissions were made on the tax return itself, and before or at the time the offense was committed. Such admissions require no corroboration. *Warszower* v. *United States,* 312 U.S. 342. To the contrary, the government is entitled to rely upon admissions made in the tax return that is the subject of a criminal tax case and is not required to corroborate them. *United States* v.

Stayback, 212 F.2d 313 (C.A. 3), certiorari denied, 348 U.S. 911; *United States* v. *Hornstein*, 176 F.2d 217 (C.A. 7); *United States* v. *Link*, 202 F.2d 592 (C.A. 3).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.